

**United States Department of Labor
Employees' Compensation Appeals Board**

S.T., Appellant

and

**DEPARTMENT OF HEALTH & HUMAN
SERVICES, FOOD & DRUG
ADMINISTRATION, Memphis, TN, Employer**

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**Docket No. 16-1710
Issued: September 27, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 22, 2016 appellant, through counsel, filed a timely appeal from a June 24, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish a traumatic injury in the performance of duty on April 23, 2015, as alleged.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

On appeal counsel argues that the decision is contrary to fact and law.

FACTUAL HISTORY

On May 8, 2015 appellant, then a 36-year-old consumer safety officer, filed a traumatic injury claim (Form CA-1) alleging that at 6:15 p.m. on April 23, 2015, she sustained face, neck, back, shoulder, and right knee injuries when her government vehicle was struck by a sport utility vehicle (SUV) that ran a red light. She noted that she was on travel status and that she was returning home to Memphis, TN at the time of the accident. The employing establishment controverted the claim as the accident occurred after appellant's approved travel hours of 8:00 a.m. to 4:30 p.m. Appellant did not stop work.

By letter dated May 15, 2015, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her as to the medical and factual evidence required and afforded her 30 days to provide this information.

In response to OWCP's May 15, 2015 letter, additional evidence was received.

A travel authorization issued on March 17, 2015 indicated that appellant was authorized for travel on April 19, 2015 to Baton Rouge, LA, and to return to Memphis, TN on April 24, 2015. Appellant would receive reimbursement for her meal and lodging expenses.

An April 23, 2015 Jacksonville Mississippi Police Report noted that the motor vehicle accident involving appellant occurred that day at "16:20 (4:20)" and involved two motor vehicles.

On April 23, 2015 appellant completed a motor vehicle accident report (Standard Form 91) for government motor vehicle involved in the accident. She noted the accident occurred on April 23, 2015 at 6:15 p.m. when her vehicle was hit by an automobile running a red light.

On May 8, 2015 appellant was issued a letter of caution by E.M., a supervisory investigator, for altering her work schedule without approval, failing to keep management informed about her whereabouts during travel, and being absent without leave (AWOL). He informed appellant that the accident on April 23, 2015, occurring at 6:20 p.m., was outside her approved work hours while on travel and was therefore outside the performance of duty.

On a prescription form dated May 8, 2015, Dr. Nidal Rahal, a Board-certified family practitioner, diagnosed neck muscle strain and referred appellant for physical therapy.

In an employing establishment memorandum dated May 11, 2015, E.M. related that he had made numerous attempts to have the Jackson Police Department report corrected as appellant had provided verbal and written statements confirming that the collision occurred at 6:20 p.m. on April 23, 2015.

On June 2, 2015 E.M. informed OWCP that while appellant had been approved for office travel from Baton Rouge, LA on April 19, 2015, returning to Memphis on April 24, 2015, she finished her training in Baton Rouge early on April 22, 2015 and began travel back to Memphis at 2:00 p.m. on April 23, 2015. E.M. explained that appellant was on the direct route when the

accident occurred and she had exited the highway to obtain gas and food when the collision occurred.

In a June 9, 2015 attending physician's report (Form CA-20), Carl Henderson, a physical therapist, noted that appellant had decreased cervical range of motion which he attributed to the April 23, 2015 motor vehicle accident.

On June 15, 2015 OWCP received an April 24, 2015 emergency room discharge summary, a negative computerized tomography lumbar scan, and a negative April 24, 2015 cervical x-ray interpretation. It also received physical therapy notes for the period April 28 to June 6, 2015.

By decision dated June 19, 2015, OWCP denied appellant's claim. It found the evidence of record insufficient to establish that she was in the performance of duty at the time of the April 23, 2015 motor vehicle accident. OWCP found appellant had deviated from her approved, scheduled work hours while traveling and, thus, was not in the performance of duty.

On July 17, 2015 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on March 18, 2016.

Following her request for a telephonic hearing, OWCP received daily progress notes for May 1, 4, 6, and 7, 2015 which were electronically signed by Mr. Henderson, but listed Dr. Randy Villaneuva, a Board-certified internist, as the physician of record. Examination findings were provided and diagnoses included neck and muscle sprains.

At the March 18, 2016 hearing, appellant testified that her travel authorization covered the period April 19 to 24, 2015 for travel between Memphis, TN and Baton Rouge, LA. She cited to Office of Personnel Regulations and the collective bargaining agreement in support of her argument that she had been in the performance of duty at the time of the accident. Appellant testified that prior to leaving for Memphis, TN she was performing employing establishment business when purchasing required steel-toed boots, which had been approved by her trainer and administrative management specialists, B.R. and E.E. According to appellant it took approximately four hours of shopping to locate the boots as the stores did not open until 10:00 a.m. and her tour of duty started at 8:00 a.m. She testified that while shopping for the boots she had been in constant contact with B.R. Neither appellant's supervisor nor the acting supervisor were notified that she left Baton Rouge, LA at 2:00 p.m. to return to Memphis, TN Appellant stated that at no time was she told that her travel and work hours were between 8:00 a.m. and 4:30 p.m.

In an April 14, 2016 response to appellant's testimony, E.M. noted that appellant's travel authorization only covered a training course. Overnight travel to purchase steel-toed shoes had not been authorized by the employing establishment. According to E.M. the assignment appellant attended in Baton Rouge, LA historically took two and one-half days to complete. Appellant completed this assignment early on April 22, 2015 and went shopping for steel-toed cowboy boots that afternoon. She resumed her search for these boots the following day. E.M. further observed that, purchasing and shopping for steel-toed boots was not part of appellant's travel authorization. Next, E.M. related that he had verbally informed appellant that she was to return to Memphis, TN if the assignment did not take the whole week covered by the travel

authorization and that she could not conduct employing establishment business unrelated to the travel authorization. He also stated that none of the individuals appellant mentioned as approving the shopping and purchasing of steel-toed shoes were in her supervisory chain of command and had no authority to alter, assign, or approve changes to her work schedule or travel assignment. E.M. concluded that steel-toed boots were easily acquired near appellant's duty station and there was nothing in the travel authorization regarding the purchase of boots.

In April 15, 2016 e-mail correspondence, K.G. noted that she was appellant's acting supervisor on April 23, 2015. Regarding the events of April 23, 2015, she advised that she had not approved the purchase of steel-toed boots in Baton Rouge, LA. Supervisor K.G. further related that appellant did not alert her to the adverse traveling/weather conditions that day.

On April 21, 2016 OWCP received appellant's undated statement describing the events of April 22 and 23, 2015. Appellant related that she completed her work on April 22, 2015 and planned on traveling back to Memphis, TN from Baton Rouge, LA the following day, April 23, 2015. She stated that she unsuccessfully attempted to purchase steel-toed boots on April 22, 2015 with B.R. after her training ended, but resumed the search on April 23, 2015 with B.R.'s assistance. After locating and purchasing the steel-toed boots, appellant headed back to Memphis, TN from Baton Rouge, LA around 2:00 p.m. Due to the bad weather during the return trip she was forced to stop twice. While returning to the interstate at approximately 6:15 p.m., after stopping to get gas and food, appellant's automobile was struck on the driver's side by an automobile which had run a red light. The police arrived at the scene of the accident and took information from appellant and the woman who had run the red light. Appellant then contacted Supervisor K.G. to inform her of the accident.

In a May 7, 2015 memorandum to E.M., appellant detailed the events of April 22 and 23, 2015 and her interactions with D.V. and B.R. She told him that she considered April 23, 2015 a travel day and that it would not take her eight hours to travel from Baton Rouge, LA to Memphis, TN. Appellant provided times and details regarding her actions that day. While returning home she encountered heavy rain and severe thunderstorms and pulled over twice, which delayed her return. Details were provided regarding the motor vehicle accident.

E.M., in a May 8, 2015 memorandum, informed appellant that her accident on April 23, 2015 occurred outside her scheduled work hours, without approval, and was therefore not in the performance of duty.

On May 18, 2016 appellant responded to E.M.'s memorandum and stated that she was not advised about specific travel times. She noted that she had approval for purchase of steel-toed shoes and disagreed with his statement that she was not approved to shop for this item in Baton Rouge, LA. Appellant stated that while on travel status it was customary practice to perform other employing establishment duties which were not mentioned in travel authorizations.

By decision dated June 24, 2016, OWCP's hearing representative affirmed the denial of appellant's claim. She found the evidence of record insufficient to establish that appellant was in the performance of duty on April 23, 2015. The hearing representative found the evidence established that the motor vehicle accident occurred outside her approved travel schedule and

there was no evidence that appellant contacted the appropriate management official to approve her delayed travel or shopping detour on April 23, 2015.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁴ including that the injury occurred in the performance of duty and that any specific condition or disability for work for which compensation is claimed is causally related to that employment injury.⁵

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty. The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of arising out of and in the course of employment, the coverage formula commonly found in other workers' compensation law. In the course of employment deals with the work setting, locale, and time of injury. Arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.⁶

The Board has recognized that Larson, in his treatise, *The Law of Workers' Compensation*, sets forth the general criteria for performance of duty as it relates to travel employees or employees on temporary-duty assignments as follows:

“Employees whose work entails travel away from the employer’s premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.”⁷

The Board has similarly recognized that FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.⁸

³ 5 U.S.C. § 8101 *et seq.*

⁴ *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *J.P.*, 59 ECAB 178 (2007); *Michael S. Mina*, 57 ECAB 379 (2006).

⁵ *G.T.*, 59 ECAB 447 (2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-217 (issued October 21, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁷ Larson, *The Law of Workers' Compensation*, § 25.01 (2009); *see also Susan A. Filkins*, 57 ECAB 630 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

⁸ *See L.A.*, Docket No. 09-2278 (issued September 27, 2010); *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

ANALYSIS

Appellant alleged that she sustained face, neck, back, shoulder, and right knee injuries on April 23, 2015 as a result of a motor vehicle accident while on travel status. By decision dated June 19, 2015, OWCP denied her claim finding that she was not within the scope of her employment at the time of the April 23, 2015 motor vehicle accident. A hearing representative affirmed the denial of her claim in a June 24, 2016 decision. The issue on appeal is whether appellant was in the performance of duty at the time of the April 23, 2015 motor vehicle accident.

The Board finds that appellant has met her burden of proof to establish that she was in the performance of duty at the time of the April 23, 2015 incident.

It is undisputed that appellant was on official travel status to Baton Rouge, LA, from Memphis, TN for the period April 19 to 24, 2015 at the time she sustained injury. She completed her work on April 22, 2015 and travelled back to Memphis, TN from Baton Rouge, LA on April 23, 2015.

Prior to departing Baton Rouge on April 23, 2015 appellant spent additional hours shopping for steel-toed boots before departing at 2:00 p.m. Appellant testified at OWCP's hearing that the purchase of steel-toed boots had been approved by supervisors, B.R. and E.E. Appellant related that while driving home, during the afternoon, she encountered a rain storm and had to pull off the highway to wait for the weather to clear. Early that evening, while continuing her travel back to Memphis, appellant exited the highway to obtain gas and food. She was back on her direct route home when the vehicle she was driving was struck by another vehicle.

While the employing establishment controverted the claim alleging that the motor vehicle accident occurred after appellant's work hours of 8:00 a.m. to 4:30 p.m., FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.⁹

The Board has held that an employee on travel away from her normal post of duty is extended coverage under FECA for all ordinary incidents which the employer would normally contemplate as occurring in the course of such mission.¹⁰ The employing establishment

⁹ *See id.*

¹⁰ A.W., 59 ECAB 593 (2008). (The employee was authorized to travel with coworkers in an employing establishment van to attend a one-day out of town conference. After the conference ended, the employee and a coworker walked through a nearby casino and the Boardwalk area in Atlantic City, New Jersey, prior to dining at a restaurant in that area. The employee fell after she exited the restaurant on her way back to the van for the return trip to the employing establishment. The Board found it was a reasonable necessity that an employee attending the conference eat at a local restaurant before departing for a three-hour, bus trip to the employing establishment in Baltimore, Maryland. The Board found that the employee's injury was sustained in the performance of duty and reversed an OWCP decision rescinding acceptance of the claim.) S.C., Docket No. 08-2440 (issued June 22, 2009). (The employee was attending a mandatory out-of-town training conference. After eating dinner, she went shopping at a local Target store with coworkers where her slip and fall occurred. The Board found that the employee's shopping at a Target store was not incidental to the duties of her temporary assignment as it was a personal activity. She ceased to be under the protection of FECA due to this deviation. Thus, her injury was found not to be in the performance of duty.)

authorized travel to Baton Rouge, LA from Memphis, TN for the period April 19 to 24, 2015. On her return trip to Memphis on April 23, 2015 she was involved in an automobile accident.

Appellant remained in the course of employment with respect to all normal incidents of her employment.¹¹ She resumed travel back to Memphis following shopping for steel-toed boots, which were required for her job, and after stopping for gas and food. These were activities incidental to her employment and travel status.¹²

At the actual time of the accident, appellant had resumed her travel back to Memphis. She was not engaged in a deviation for personal reasons at the time of the accident.¹³ The Board finds that appellant was in the performance of duty when she sustained injury on April 23, 2015. As the incident giving rise to injury occurred while driving back to Memphis, TN it arose in the course of appellant's employment.¹⁴

The case will therefore be remanded to OWCP for further development of the medical evidence regarding the issue of appellant's injury and disability arising from the April 23, 2015 incident.

CONCLUSION

The Board finds that appellant was injured while in the performance of duty on April 23, 2015.

¹¹ Compare *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein at 237-38.

¹² See *A.W.*, *supra* note 10.

¹³ Compare *A.D.*, Docket No. 13-490 (issued August 6, 2013) (Appellant was injured in a motor vehicle accident in Lake City, FL while returning to Panama City, FL from her temporary duty station in Jacksonville, FL. On her return trip to Panama City, FL, appellant stopped on Saturday in Orlando, FL to visit her sister, which had been approved by her supervisor, and then resumed her trip to Panama City, FL from Orlando, FL on Sunday. The injury occurred on a day she was not scheduled to work and on a route that was not a main business route. The Board found appellant's injury was not sustained in the performance of duty as the origin of her injury was her travel from Orlando, FL, which was not incidental or essential to her temporary-duty assignment in Jacksonville, FL)

¹⁴ See *L.A.*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2016 is reversed. The case is remanded for further development in conformance with this decision.

Issued: September 27, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board